EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

ISHOW 3 PROCEEDINGS AND ORDERS DATE: 101586

CASE NBR 85-1-06889 CSH
SHORT TITLE Dufour, Donald W. DOCKETED: May 8 1986
VERSUS Mississippi

Date	Proceedings and Orders
May 8 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 11 1986	Order extending time to file response to petition until July 9, 1986.
Jul 9 1986	Order further extending time to file response to petition until July 23, 1986.
Jul 23 1986	Brief of respondent Mississippi in opposition filed.
Jul 31 1986	DISTRIBUTED. September 29, 1986
Oct 3 1986	REDISTRIBUTED. October 10, 1986
Oct 14 1986	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence

CONTINUE 1

PROCEEDINGS AND ORDERS DATE: 101586

CASE NBR 85-1-06889 CSH
SHORT TITLE Dufour, Donald W. DOCKETED: May 8 1986
VERSUS Mississippi

Date	Proceedings and Orders
Oct 14 1986	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

****

(2)

No. 85-6389

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985 TERM

DONALD DUFOUR *

Petitioner *

v. *

STATE OF MISSISSIPPI *

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF MISSISSIPPI

Bernard S. Grimm
500 Indiana Avenue, N.W.
WAshington, D.C. 20001
202-628-1200

Robert E. Morin
Suite 201
419 Seventh Street, N.W.
Washington, D.C. 20004
202-638-6700

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Whether a state may reject a claim that an indigent capital defendant was a denied effective assistance of counsel because of counsel's failure to retain an psychiatrist or psychologist to present mitigating evidence at the sentencing phase of the trial because the petitioner has failed to prove that he was "prejudiced", when at the same time the state court denies the indigent capital defendant the funds to retain a psychologist or psychiatrist for the purpose of proving such a claim?

2. What, if any, prejudice is required to establish that an indigent capital defedant was denied access to mental health experts to present psychological or psychiatric circumstances in mitigation of sentence, because such requests were prohibited as a matter of state law, or because counsel was ineffective in not requesting such services prior to trial?

3. Whether petitioner was denied effective assistance of counsel at the sentencing phase of his capital trial because of counsel's failure to investigate the defendant's background for mitigating circumstances?

OPINIONS BELOW

The opinion of the Mississippi Supreme Court on direct appeal is reported at 453 So.2d 337 (Miss. 1984). The opinion of the that court denying petitioner's post conviction Motion to Vacate Judgment and Sentence, is styled Dufour v. State, (No. 55, 053, December 18, 1985)(Appendix A). Rehearing was denied without opinion of February 26, 1986. (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the Mississippi Supreme Court as to Petitioner's post conviction application was entered on December 18, 1985. A petition for rehearing was denied on February 26, 1986.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3), Petitioner having asserted below and asserting herein deprivation of his rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution which provides in part:

> No person shall be . . . deprived of life liberty or property, without due process of law . . .

2. The Sixth Amendment to the Constitution which provides in part:

> . . . in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense.

3. The Eighth Amendment to the Constitution which provides in part:

> . . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. The Fourteenth Amendment to the United States Constitution which provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF FACTS AND PROCEEDINGS

A. FACTS:

On March 31, 1983, following a jury trial in the Circuit Court of the First Judicial District of Hinds County, Mississippi, Petitioner was convicted of capital murder and sentenced to death for the killing of Earl Wayne Peeples during the commission of a robbery on October 14, 1982.

The principal evidence against Petitioner at trial was the testimony of his alleged accomplice, Robert Taylor. Taylor testified that he participated in the robbery and killing of Peeples, and admitted killing another man, Danny King, during the same incident. Taylor testified pursuant to a plea agreement with the State.

According to Taylor, he and Petitioner arrived in Jackson, Mississippi on October 13, 1982, en route from Florida to Houston, Texas. Taylor slept during part of the trip and woke up in the car outside of a bar in Jackson. He entered the bar, which was frequented by homosexuals, shortly after midnight on the morning of October 14, 1982, and said he found Petitioner already inside.

Taylor testified that he and Petitioner subsequently left the bar and drove to Peeples' apartment house with Peeples and King and another person. Once inside the apartment according to Taylor, he went into the kitchen, created a diversion, and grabbed a knife and screwdriver. He then went into the other room. He then threw Petitioner one of the instruments. Then, according to Taylor, Petitioner held the knife on Peeples while he questioned him as to where he kept his money. When Peeples asked for time to get money, Petitioner stabbed him several times.

Taylor described Petitioner to have thrust the steak knife deep into Peeples' chest. At the same time, Taylor stabbed King

with a screwdriver several times. Taylor then allegedly took a shower and when he came out he observed that Peeples' pockets were turned inside out and that Petitioner had looked through Peeples' personal belongings and put them in a blanket which Petitioner then placed in the rear seat of Peeples' car. Taylor drove the car approximately one quarter mile from the apartment when the car became stuck on the side of the road. Taylor stated that after the car became stuck, Petitioner requested him to return to the apartment to locate King's car. As Taylor was returning to the apartment he was arrested by police who observed him running barefoot and shirtless. Following his arrest, Taylor confessed to killing King and implicated Petitioner in the killings of King and Peeples.

Petitioner testified at trial. He testified that he and Taylor arrived in Jackson on October 13, 1982, in Taylor's car, en route from Florida to Texas. The two men went to a bar frequented by homosexuals and shot pool. Petitioner left Taylor in the bar and returned alone to Taylor's car where he went to sleep. He awoke the next day and waited for Taylor to return. He could not move the car as he did not have the keys to it.

A disinterested witness who worked in the building in front of which the car was parked, confirmed seeing Petitioner apparently sleeping in the car. When Taylor did not return to the car by the afternoon of October 14, 1982, Petitioner went to a boarding house to wait for him. The following day he learned from reading a newspaper that Taylor had been arrested and had implicated him in the killings of Peeples and King. He did not contact Taylor or the police because he was on parole in another state and should not have been in Mississippi. On October 29, 1982, Petitioner returned with a companion to the same bar in which he had been previously with Taylor. He was arrested there after having been recognized by an employee of the bar who called the police.

Following Petitioner's conviction for capital murder for the killing of Earl Peeples, a separate jury proceeding was held to determine whether Petitioner should be sentenced to death. During the penalty phase of Petitioner's trial, the state contended that Petitioner should be sentenced to death because (1) the killing of Peeples was committed during the commission of a robbery for pecuniary gain, and (2) the circumstances of the offense were "especially heinous, atrocious and cruel". The State's evidence that the circumstances of the offense were "especially heinous, atrocious and cruel" consisted in large part of Taylor's testimony concerning the circumstances of Peeples' killing. The only evidence in support of the State's contention that Petitioner killed Peeples in the course of a robbery and for pecuniary gain was Taylor's testimony. No evidence was offered at the sentencing hearing by counsel for Petitioner. The jury found that the aggravating circumstances were established and returned a verdict for the death penalty. Immediately following the return of the jury's verdict, the court sentenced Petitioner to death. Petitioner filed a timely appeal of his conviction and death sentence with the Supreme Court of Mississippi.

B. HOW FEDERAL QUESTIONS WERE PRESERVED

Each of the issues were presented to the Mississippi Supreme Court for review in a post-conviction application entitled Motion to Vacate Judgment and Sentence, pursuant to Mississippi Code Annotated Sec. 99-39-1, et seq. (Supp 1984), providing for such review. With respect ot each issue Petitioner claimed violation of his Constitutional rights, citing the appropriate Constitutional amendment and authorities to the Mississippi court in support of his contentions. As set forth in the opinion of the Mississippi court the constitutional claim that the defendant was denied effective assistance of counsel at the sentencing hearing, was adjudicated on its merits and rejected by that court, and thereby rejecting Petitioner's request for the appointment of an

expert to assist him in presenting his claim. Slip op. at 2-3, 4-6. Similarly, the Mississippi Supreme Court expressly ruled on the merits of and rejected Petitioner's claim that the excusal of jurors who had reservations about the imposition of the death penalty but who nonetheless could be fair and impartial as to guilt or innocence. Slip opinion at 7-8.

REASONS FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED TO ADDRESS THE IMPORTANT ISSUE OF WHETHER A STATE COURT MAY REJECT BECAUSE THERE WAS NO SHOWING OF PREJUDICE, A POST-CONVICTION CLAIM BY AN INDIGENT CAPITAL DEFENDANT THAT HE WAS UNCONSTITUTIONALLY DENIED ACCESS TO MENTAL HEALTH EXPERTS TO PRESENT MITIGATING EVIDENCE AT HIS SENTENCING HEARING, OR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEY DID NOT ADEQUATELY REQUEST SUCH SERVICES PRIOR TO TRIAL, WHILE AT THE SAME TIME REFUSE TO GRANT A REQUEST BY THE DEFENDANT FOR FUNDS TO RETAIN AN EXPERT TO PROVE HIS CLAIM IN THE POST-CONVICTION PROCEEDINGS.

2. THE WRIT SHOULD BE ISSUED IN ORDER TO ADDRESS THE IMPORTANT ISSUE OF WHAT, IF ANY, STANDARD OF PREJUDICE IS REQUIRED IN ORDER TO OBTAIN RELIEF ON THE CLAIM THAT AN INDIGENT CAPITAL DEFENDANT WAS DENIED ACCESS TO A MENTAL HEALTH EXPERT TO PRESENT EVIDENCE IN MITIGATION OF SENTENCE EITHER BECAUSE STATE LAW PROHIBITED SUCH REQUESTS, OR BECAUSE HIS ATTORNEYS WERE INEFFECTIVE IN MAKING SUCH A REQUEST.

In his post-conviction application before the Mississippi Supreme Court, Petitioner asserted a denial of his constitutional rights because he was denied the opportunity to retain a psychiatric and/or psychological expert who could have assisted in his defense and sentencing, or in the alternative, a denial of effective assistance of counsel because his counsel did not adequately request such assistance because of they understood existing state law to prevent such requests.

Prior to trial defense counsel failed to make application to the court for funds to conduct a psychological evaluation of Petitioner for the purpose of determining whether mitigating

circumstances existed. Although counsel did seek and obtain an evaluation as to competency and criminal responsibility at the time of the crime, counsel made no attempt to obtain the services of experts to conduct psychological evaluations to determine whether mitigating circumstances existed. The affidavits submitted below and which were reviewed by the Mississippi court in rendering its decision, clearly indicate that an examination for competency and criminal responsibility is no substitute for a psychological investigation for mitigating circumstances. As stated by Dr. Charles Stanley, who examined Petitioner prior to trial:

> 3. We were never asked to evaluate Mr. Dufour for the purpose of assisting the defense in developing psychological mitigating factors. This would have required a whole different kind of evaluation. The difference between the two types of evaluations [competency and determination of mitigating factors] is like the difference between a lawyer representing a client for a land deed and representing a client for a bankruptcy. We would have needed to conduct psychological tests which we did not do in this case. We would have needed to thoroughly examine Mr. Dufour's history which we did not do. We simply were not ordered by the court to conduct that type of evaluation. The evaluation for mitigating psychological factors would have involved additional time and expense.
>
> 4. Because our evaluation of Mr. Dufour was limited to the above-stated purposes, we could not provide any psychological mitigating explanation for why Mr. Dufour would have committed the alleged crimes, if such explanation does exits.

Affidavit of Dr. Charles Stanley. No mental health expert was made available to the defense in part because counsel for Petitioner failed to request such assistance. As explained by counsel,

> The decision not to hire a psychiatrist or psychologist was based on financial constraint imposed and was not strategic in nature. Donald Dufour is an indigent person. We did not move the court for funds for an investigation of psychological mitigating factors because we did not believe the court would grant such a motion, there being no statutory authority in Mississippi.

See Affidavits of of Attorneys Kenneth Stribling and Robert S. Houston.

Prior to Petitioner's trial, decisions of the Mississippi Supreme Court indicated that an indigent defendant did not have a constitutional right to such assistance. See Davis v. State, 374 So.2d 1293 (Miss. 1979); Phillips v. State, 197 So.2d 241, 244 (Miss. 1967); Laughter v. State, 235 So.2d 468 (1970). Thus, although counsel for Petitioner indicated that such expert assistance was "absolutely necessary," no requests were made because they "did not believe the court would grant such a motion, there being no statutory authority in Mississippi." Affidavit of Stribling and Houston, paragraph 8. 1/

In effect, Petitioner was denied this important constitutional right due to one of two things: (1) the Mississippi Supreme Court's prior decisions which did not provide for the provision of experts under which his counsel presumably were acting, or (2) the misunderstanding of state law by his counsel who thought that such expert assistance was prohibited by state law. 2/

With respect to these claims the Mississippi Supreme Court denied relief stating:

1/ Later the Mississippi Supreme Court modified its rule to and indicated that there would be no blanket prohibition against such requests but would be decided on a case-by-case basis. See, e.g., Ruffin v. State, 447 So.2d 113, 118 (Miss. 1984). However, this decision was not rendered until after Petitioner's trial. Accordingly, Petitioner did not have the benefit of it.

2/ The Court in Ake v. Oklahoma, 105 S.Ct. 1087 (1985) made clear the a capital defendant has right to expert assistance in areas of mental health under Constitution. Courts have recognized that this right includes obtaining the services of an expert for presentation of mitigating circumstances at a capital sentencing hearing. Westbrook v. Zant, 704 F.2d 549 (11th Cir. 1982). Failure of trial counsel to research the relevant law and present their request to the trial court may have not been excusable, regardless of their belief of the possible success of such a request. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

> Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an examination would have produced the claimed results, nor has prejudice been show.

Slip opinion at 2-3. However in his initial application and in his petition for rehearing Petitioner made clear that he was indigent and could not afford to retain the services of a psychologist or psychiatrist to present mitigating circumstances which could have been presented. 3/

To reject the claim that he, as an indigent, was unconstitutionally denied the right to expert assistance or effective assistance of counsel at the time of trial because he does not make a showing of what would be presented by such an expert puts Petitioner in a catch-22 position - he asserts that he was and is indigent and unconstitutionally denied the assistance of an expert but is denied relief because he is indigent and does not have an expert to assist him in proving his claim.

Although this Court has held that an indigent defendant is not constitutionally entitled to an attorney to pursue discretionary appellate review in noncapital cases, Ross v. Moffitt, 417 U.S 606 (1974), it has also held that states are required to take measures to assure meaningful access to the courts so that indigent inamtes can present their claims. Bounds v. Smith, 430 U.S. 817 (1977). Moreover, this Court has observed

---

3/ In his affidavit supporting his post-conviction application, Petitioner stated that he "qualified as an indigent in this case at trial and I am still without funds to hire an attorney. The attorneys I have now are doing this on a volunteer basis. I have no Money to pay them or to hire any experts or investigators." Affidavit of Donald Dufour at page 2. In his post-conviction application Petitioner requested that the Mississippi Court enter an order "allowing funds to Petitioner to retain the services of an investigator and or psychologist psychiatric expert". Motion at page 33. He renewed that request in his petition for rehearing, "In order to properly adjudicate this claim Mr. Dufour requests that this court appoint him an independent expert to assist him making any showing the court may require". Petition for rehearing at 3.

that unlike noncapital cases, most death penalty cases will be subject to federal post-conviction review. Barefoot v. Estelle, 463 U.S. 880 (1983). Although, such as in this case, volunteer counsel often provide services on a pro bono basis and represent indigent defendants in post-conviction proceedings, funds for experts are not available. Requiring an indigent defendant to prove "prejudice" by establishing what an expert would have presented at trial, and then denying the Petitioner funds to retain an expert in post-conviction proceedings, dooms the claim to failure without review of its substance. Thus, this Court should grant the writ to review this important issue.

Moreover, with respect to the substantive claim that he was denied expert assistance, contrary to the decision of the Mississippi court below, the Court in Ake v. Oklahoma, 104 S. Ct. 1087 (1985) did not require that indigent capital defendant make a showing of "prejudice". In Ake the capital defendant had requested the appointment of an expert to assist him in the evaluation of whether an insanity defense was appropriate. The Court found, inter alia, that the refusal of the trial court to provide such assistance denied the indigent capital defendant important constitutional rights. Importantly, however, the Court did not remand the case to determine whether an expert would have found that the defendant was insane, or would have provided testimony relevant to the question of sentencing. Instead, the Court vacated the conviction and the death sentence and remanded the case for a new trial. Thus, the Court did not require a showing of prejudice, but, much like the denial of counsel to the indigent defendant, presumed that prejudice occurred. Accordingly, the standard utilized by the Mississippi Court was erroneous and this Court should grant the writ to correct the decision.

3. THE WRIT SHOULD BE ISSUED TO REVIEW THE DECISION BY THE MISSISSIPPI COURT WHICH HELD, WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING THAT PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING HEARING

In his post-conviction application Petitioner alleged that he was denied effective assistance of counsel at his capital sentencing hearing. At his sentencing hearing counsel presented no evidence in mitigation of sentence. In his post-conviction application, Petitioner established that there were persons willing to testify and who were available. See Affidavits of John Dufour and George Dufour. In addition, his counsel indicated that they conducted little if any investigation into Petitioner's background because of the lack of financial resources and the fact that most of Petitioner's family were from out of state. See Affidavit of F. Kent Stribling and R. L. Houston. Despite these matters, the Mississippi Supreme Court denied the claim summarily without an evidentiary hearing. The decision by the Mississippi Supreme Court conflicts with decisions by other courts which have held that an attorneys' failure to conduct and adequate investigation into a defendant's background and to present available mitigating evidence warrants that the sentence be vacated. See, King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct. 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984); Tyler v. Kemp, 755. F.2d 741 (11th Cir. 1985), cert. denied, 34 Cr. L. Rptr. 411 (1985).

The Sixth Amendment guarantees to all criminal defendants "the right to the effective assistance of counsel." See McMann v. Richardson, 397 U.S. 759, 771 (1970). In Strickland v. Washington, 104 S.Ct. 2052 (1984), the Court enunciated standards by which to measure a claimed denial of effective assistance of counsel. The test set forth by the Court requires a two-pronged showing of (1) deficient performance by counsel as measured by

the standards of the profession and (2) prejudice to the defendant. Id. at 2064.

The Court held that counsel's performance is deficient if it falls "below an objective standard of reasonableness . . . considering all the circumstances." Id. at 2065. With respect to the prejudiced standard the Court directed that in a capital case, the two phases of trial be analyzed separately:

> When a defendant challenges a conviction, the question is whether there is a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is reasonable probability that, absent the errors, the sentencing--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 2069. The Court defined a "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." Id. at 268.

Counsel's performance may be adjudged inadequate either by reference to specific errors or based on the performance as a whole. See United States v. Cronic, 104 S.Ct. 2039, 2046 n.20 (1984). Moreover, there may be some circumstances where the reviewing court may presume prejudice where the likelihood that any lawyer could provide effective assistance is "small". Cf. United States v. Chronic, 104 S.Ct. at 2047.

As the Court held in Woodson v. North Carolina, 428 U.S. 280, 304 (1976), "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Obviously, given the scope and nature of capital sentencing, it is essential "that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976). Just as obvious, such

information will not be presented to the jury unless counsel undertakes an adequate investigation for mitigating evidence and presents it at sentencing.

An independent and thorough investigation by counsel into the background of a capital defendant and the circumstances of his crime is critical to any adequate presentation of mitigating evidence about a capital defendant, and has been recognized by all courts which have addressed the issue. See for example, Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983); Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983); Baldwin v. Maggio, 704 F.2d 1325, 1382-33 (5th Cir. 1983), cert. denied, 104 S.Ct. 2669 (1984), Bell v. Watkins, 692 F.2d 999, 1009 (5th Cir. 1982) cert. denied, 104 S.Ct. 142 (1982); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); ABA Standards for Criminal Justice (2d Ed. 1980) at 4-55. Courts have held that the Sixth Amendment "requires defense counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment, and to ground the strategic selection among those potential defenses on an informed, professional evaluation of their relative prospects for success." Baldwin v. Maggio, 704 F.2d at 1332-33. Such an inquiry should require at a minimum "an independent search for witnesses witnesses with knowledge of the defendant's character, disposition to commit crimes and extenuating circumstances." Id. at 1333; see Goodpaster, The Trial for Life 58 N.Y.U.L.Rev. 299, 323-24.

The ABA Standards state that:

> "The lawyer needs to know essential facts, including events surrounding the act charged, information concerning the defendant's background . . . In criminal litigation, as in other matters, information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case cannot serve the client effectively."

Id. at 4-33. Similarly, Standard 4-4.1 states that:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

Id.

Once an adequate investigation has been conducted, at sentencing the attorney has a "duty to advocate the defendant's cause," see Strickland v. Washington, 104 S.Ct. at 2065, which includes the duty to present evidence in mitigation. The ABA Standards for Criminal Justice (2d Ed. 1980), describe the lawyer's responsibility as follows:

> "The lawyer . . . has a substantial role to perform in raising mitigation factors . . . to the court at sentencing. This cannot be effectively done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, educational, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as well as mitigating circumstances surrounding the crime itself."
>
> * * *
>
> "[t]he defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed . . . the attorney should take particular care to make certain that the record of the sentencing proceedings will accurately reflect all relevant mitigating circumstances relating either to the offense or to the characteristics of the defendant . . . and to ensure that such record will be adequately preserved."

ABA STANDARDS at 4-55, 18-6.3.

In this case, if they had investigated, 4/ counsel would have discovered substantial witnesses who could have and would have provided favorable evidence regarding Petitioner. Specifically, if witnesses who were available and willing to come forward had testified, the following facts could have been elicited:

a. Petitioner was raised in an unstable family environment. He family was constantly required to move because of his father's job. Because of this, Petitioner never had a stable and permanent living environment and was unable to make any friends. Consequently, he tended to become withdrawn and isolated.

b. Petitioner was subjected to violent physical abuse by his father. His father was an alcoholic who physically abused Petitioner's mother and Petitioner. He would severely beat the mother and Petitioner whenever he was intoxicated. At times he would beat Petitioner by hitting him with a leather belt, using the buckle, or with a wooden stick. The violence inflicted on Petitioner by his father was both senseless and random.

c. Despite being the subject of physical abuse, Petitioner was a contributing member of his household. He spent most of his

---

4/ In their affidavit counsel stated that:

> The failure of the trial court to provide us with an investigator hindered our preparation for the sentencing phase of trial to the extent that we were able to conduct almost not investigation of mitigating factors. Donald Dufour lived almost all his life in Orlando, Florida. The only thing we were able to do was talk on the telephone with two of Mr. Dufour's brothers. From the conversation with the brothers we became aware that in order to conduct the necessary investigation of mitigating circumstances we would have to travel to Florida or hire an investigator to do so. Because of time and financial constraints, we were unable to go to Florida to Investigate Mr. Dufour's background and history . . . .

Affidavit of F. Kent Stribling and R. L. Houston.

time as a child helping his family do things around the house. His father was rendered partially disabled by an injury which required the children in the family to do most of the work. Petitioner was seen by other family members as always being willing to help his mother and always trying to please his father. However, his efforts were apparently never recognized by Petitioner's father, who continued to abuse Petitioner nonetheless.

d. Petitioner was never involved in any trouble while growing up. To the contrary, he was seen as an affectionate and loving person who cared for many older people in his neighborhood. Petitioner volunteered to do chores for these persons and would assist them whenever he could. He also was known to be very affectionate and loving toward children.

e. Around the age of eighteen, Petitioner began to experiment with drugs, primarily to escape his unstable family life. He started sniffing glue and soon experimented with other illegal substances. Eventually, he became a heroin addict and once almost lost his right arm because of an infection developed from injecting drugs. Despite his addiction, he tried on many occasions to give up drugs but was not able to. During this period of time when they were most needed, his family offered no support to Petitioner. As a result, Petitioner became isolated from family members and even more addicted to drugs.

f. Petitioner was substantially affected by the death of his mother in 1977. She died of cancer, and at the time Petitioner was incarcerated in a Florida institution. The family members observed him as almost uncontrollable in his grief when he attended his mother's funeral. Other members recognized that Petitioner's mother was probably the only person who was ever close to Petitioner. The death of his mother exacerbated both the personal and emotional problems Petitioner was suffering, and his drug addiction upon his release became more acute.

g. Despite the crimes with which he was convicted, there are persons who know and care for Petitioner and would be affected by his death.
See, Affidavits of John Dufour and George Dufour. These and other circumstances have been recognized by this Court as constitutionally recognized mitigating circumstances which a sentencer cannot be precluded from considering. Eddings v. Oklahoma, 455 U.S. 104 (1980); Lockett v. Ohio, 438 U.S. 586 (1978). However, in this case, the jury was precluded from considering these circumstances - precluded because of counsel's inaction.

This picture of Petitioner stands in stark contrast to what was presented, or more accurately what was not presented at sentencing. Absolutely no evidence was presented by defense counsel at the capital sentencing hearing. Testimony of such witnesses was critical in order for the jury to consider the circumstances of Petitioner's life which might have been the basis for a sentence of less than death. The prosecution exploited this lack of information about the Petitioner during closing arguments when it asserted to the jury that:

> Now, y'all heard all the testimony in this case and I got this morning early, earlier than I usually do, and I was wondering what the defense was going to argue under the classification mitigating circumstances. From the record in this case, I can't think of one reason, not one bit of testimony, I couldn't come up with any mitigating circumstances. And let me tell you something. It's unfortunate that a man can live twenty-six or twenty seven years and not have one thing in his background in his favor.

R. 659, 660.

In this case there was a wealth of mitigating evidence which was never presented to the jury because the attorneys never undertook an adequate and complete investigation. Defense counsel

g. Despite the crimes with which he was convicted, there are persons who know and care for Petitioner and would be affected by his death.
See, Affidavits of John Dufour and George Dufour. These and other circumstances have been recognized by this Court as constitutionally recognized mitigating circumstances which a sentencer cannot be precluded from considering. Eddings v. Oklahoma, 455 U.S. 104 (1980); Lockett v. Ohio, 438 U.S. 586 (1978). However, in this case, the jury was precluded from considering these circumstances - precluded because of counsel's inaction.

This picture of Petitioner stands in stark contrast to what was presented, or more accurately what was not presented at sentencing. Absolutely no evidence was presented by defense counsel at the capital sentencing hearing. Testimony of such witnesses was critical in order for the jury to consider the circumstances of Petitioner's life which might have been the basis for a sentence of less than death. The prosecution exploited this lack of information about the Petitioner during closing arguments when it asserted to the jury that:

> Now, y'all heard all the testimony in this case and I got this morning early, earlier than I usually do, and I was wondering what the defense was going to argue under the classification mitigating circumstances. From the record in this case, I can't think of one reason, not one bit of testimony, I couldn't come up with any mitigating circumstances. And let me tell you something. It's unfortunate that a man can live twenty-six or twenty seven years and not have one thing in his background in his favor.

R. 659, 660.

In this case there was a wealth of mitigating evidence which was never presented to the jury because the attorneys never undertook an adequate and complete investigation. Defense counsel

failed to investigate whether there were any potential witnesses who could have presented favorable testimony and why Petitioner deserved to have his life spared. This Court should issue the writ to review these circumstances and vacate the sentence of death.

CONCLUSION

For the reasons stated herein the Court should issue a writ of certiorari to the Supreme Court of Mississippi to review the decision of that court in this case.

Bernard S. Grimm
500 Indiana Avenue, N.W.
WAshington, D.C. 20001
202-628-1200

Robert E. Morin
Suite 201
419 Seventh Street, N.W.
Washington, D.C. 20004
202-638-6700

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,053

DONALD WILLIAM DUFOUR

V.

STATE OF MISSISSIPPI

ON MOTION TO VACATE JUDGMENT AND SENTENCE

EN BANC.

ROY NOBLE LEE, PRESIDING JUSTICE, FOR THE COURT:

Petitioner Donald William Dufour was convicted in the Circuit Court for the First Judicial District of Hinds County, Mississippi, of capital murder, and was sentenced to suffer the death penalty. On April 11, 1983, he filed a motion for new trial raising twenty-one (21) grounds for relief, which motion was subsequently denied. Petitioner appealed to the Mississippi Supreme Court, which unanimously affirmed the conviction and sentence on June 6, 1984, and a petition for rehearing was denied July 25, 1984. The facts of the case are stated in Dufour v. State, 453 So. 2d 337 (Miss. 1984).

Petitioner filed with the United States Supreme Court a petition for writ of certiorari to the Mississippi Supreme Court, which was denied February 19, 1985. Dufour v. Mississippi, ___ U.S. ___, 84 L.Ed.2d 368, ___ S.Ct. ___ (1985). Petition for rehearing was denied by the United States Supreme Court April 1, 1985.

On June 17, 1985, the petitioner filed a Motion to Vacate Judgment and Sentence, pursuant to Mississippi Code Annotated § 99-39-1, et seq. (Supp. 1984). Petitioner seeks relief under the Mississippi Uniform Post-Conviction Collateral Relief Act, but claims that the procedural bar provision of the act did not apply to him since it was not in effect at the time of petitioner's 1983 trial. We hold that petitioner's contention that the waiver and procedural bar provisions of the act do not apply to his case is without merit. Actually, Mississippi Code § 99-39-1, et seq. is largely a codification of the existing law. Leatherwood v. State, 473 So. 2d 964 (Miss. 1984); Tokman v. State, 475 So. 2d 457 (Miss. 1985).

CLAIMS

A.

Petitioner was Deprived of His Right to Effective Assistance of Counsel.

(1) Failure to Investigate and Present Mitigation Witnesses.

Petitioner claims that defense counsel failed to investigate whether there were any potential witnesses who could have presented favorable testimony as to why he deserved to have his life spared. Petitioner's counsel, R. L. Houston, talked with petitioner's brothers in Florida on several occasions, although they state in their affidavits that they cannot recall speaking to the Jackson attorneys. They told Houston that they would not come to Jackson nor did they want to get involved in the trial of their brother's case. They refused to help petitioner at that time.

(2) Failure to Investigate, Obtain and Present Psychiatric or Psychological Evidence.

Petitioner claims that defense counsel failed to make application to the trial court for funds to conduct a psychological evaluation of petitioner for the purpose of determining whether mitigating circumstances existed. Further, that he had no expert assistance because counsel did not request it. However, petitioner was examined pursuant to a court order. The professionals were not people selected by the State, but by the trial court. Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an

examination would have produced the claimed results, nor has prejudice been shown.

(3) Trial Counsel's Failure to Request Instructions on Lesser-Included Offenses and Elements of the Primary Offense Charged.

Petitioner claims that his counsel was ineffective for not offering a complete instruction on, or objecting to the failure to instruct, on the elements of the underlying felony of robbery. The Court considered the question of whether or not a robbery was in fact committed, and found that the evidence fully supported the finding that robbery had been committed. Dufour v. State, 453 So. 2d at 346.

(4) Failure to Object to Prosecutorial Misconduct.

Prosecutorial misconduct will be referred to hereinafter. Petitioner contends that his counsel failed to prevent persistent misconduct of the prosecutor throughout the trial and the sentencing. Appellee contends that the examples cited by petitioner are within the limits of proper conduct and argument and that there was no prosecutorial misconduct. We think that petitioner has failed to show prejudice under this claim.

(5) Failure to Adequately Cross-Examine State's Witness.

Petitioner claims that defense counsel failed to adequately cross-examine the State's primary witness, Robert Taylor. The record reflects that the plea bargain agreement between the State and Taylor was introduced into evidence, paragraph 2 of which agreement states:

> Upon entry of a plea of guilty to the aforesaid crimes [the murders of Daniel Earl King and Earl Wayne Peeples], the State will recommend that Robert Taylor be sentenced to two (2) concurrent life terms rather than seeking the death penalty.

Any jury of average intelligence would have to be aware of benefits to Taylor of the plea agreement.

(6) Failure to Object to Improper Evidence of Other Crimes.

Petitioner claims that defense counsel failed to object in a timely manner to improper evidence of other crimes, viz, that the prosecutor deliberately put before the jury evidence that another person had been murdered. The jury already knew that two people were murdered in the apartment that night and evidence had been introduced over objection to such facts. [Exhibits 4-N (R.335); 4-D (R.336) (R.341-3420]. Petitioner has not shown that he was prejudiced by such alleged failure.

(7) Failure to Make an Adequate Request for Investigative Services.

On the direct appeal in this case, the appellant assigned as Error #1 that the trial court erred in refusing the appellant's request to hire an investigator. Although no proposed names, locations or investigative possibilities were pointed out to the lower court, as stated, supra, relatives of the petitioner were unwilling to cooperate or come to Mississippi for the purpose of assisting in the trial.

(8) Failure to Object to Prosecution-Prone Jury.

The substance of this contention will be discussed in Section G, infra.

(9) Failure to Present Errors on Appeal.

Discussion of authorities hereinafter will relate to this contention.

The nine (9) claims hereinabove, which relate to the total claim of ineffective assistance of counsel must be considered, singly and collectively, after applying the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court has applied the standard in Leatherwood v. State, 473 So. 2d 964 (Miss.

1985); Lambert v. State, 462 So. 2d 308 (Miss. 1984); Ward v. State, 461 So. 2d 724 (Miss. 1984); In Re Hill, 460 So. 2d 792 (Miss. 1984); Stringer v. State, 454 So. 2d 468 (Miss. 1984); and Thames v. State, 454 So. 2d 486 (Miss. 1984).

In Leatherwood v. State, 473 So. 2d 964 (Miss. 1985), on Motion to Vacate, or to Set Aside Judgment and Sentence pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code Annotated § 99-39-1, et seq. (Supp. 1985), relying upon Strickland v. Washington, supra, this Court said:

> The legal test as to effective assistance of counsel was recently established in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the United States Supreme Court held that on a claim of ineffective assistance of counsel the benchmark is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ___ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93. This is because counsel plays a critical role in assuring that the adversarial system does produce a just result.
>
> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was (1) deficient, and that (2) the deficient performance prejudiced the defense. If the defendant fails to prove either component then reversal of a conviction or sentence is not warranted. ___ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed. at 693.
>
> The defendant is required to specify the acts or omissions that are alleged to be the result of unreasonable legal assistance.
>
> In assessing whether or not a defendant received a fair trial or whether a fair trial was undermined by counsel's errors: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ___ U.S. at ___, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.
>
> In assessing whether counsel's performance was deficient the standard of performance is that of "reasonably effective assistance." ___ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. This continues to be reasonableness under prevailing professional norms and reasonableness considering all the circumstances.
>
> There is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. There are however certain basic duties required of an attorney when representing a criminal defendant. These duties include the following: to assist the defendant, to advocate the defendant's cause, to consult the defendant on important decisions and to keep the defendant informed of important developments. However, there is no exhaustive list and no set of detailed rules which can take into account all the circumstances counsel faces or all the legitimate decisions on how to represent a defendant. There is no single, particular way to defend a client or to provide effective assistance.
>
> To fairly assess the attorney performance "every effort [must] be made to eliminate the distorting effects of hindsight." ___ U.S. at ___, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. A particular strategy must be assessed from its inception as to its unreasonableness rather than from its ultimate success or lack thereof.
>
> The totality of the evidence before the judge or jury should be considered in assessing whether there was prejudice, not just the factual findings which are affected by error.
>
> Along with the presumption that counsel's conduct is within the wide range of reasonable conduct, there is a presumption that decisions made are strategic. Murray v. Maggio, 736 F.2d 279, 292 (5th Cir.1984). Courts are also reluctant to infer from silence an absence of strategy. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983).

473 So. 2d at 968-69.

We are of the opinion that the petitioner has not demonstrated that his claims of ineffective assistance of counsel have met the two-pronged test of Strickland v. Washington, supra, viz, (1) counsel's performance was deficient to the extent that he made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment, and (2) the deficient performance prejudiced the defense to the extent that counsel's errors were so serious as to deprive petitioner of a fair trial, a trial whose result is reliable.

B.

Persistent Prosecutiral Misconduct Rendered
The Trial and Sentencing Fundamentally Unfair.

Under Claim B, the petitioner presents eleven (11) designated areas in which he contends that prosecutorial misconduct rendered the trial and sentencing unfair. Motion, pp. 16-26. These claims were not raised either at trial or on direct appeal. Therefore, they are waived, and petitioner

cannot now raise those issues. Billiot v. State, On Motion to Vacate or Set Aside Sentence, decided October 30, 1985 [Not yet reported]; Wilcher v. State, Miss. Nos. 53,370 and 54,959, decided October 30, 1985. [Not yet reported]; Leatherwood v. State, 473 So. 2d 964 (Miss. 1985); and Callahan v. State, 426 So. 2d 801 (Miss. 1983), cert. den. 461 U.S. 943, 77 L.Ed.2d 1300, 103 S.Ct. 2118 (1984).

C. - H(2d)

(No claim designated C).

Section D of the motion claims error on the failure of the lower court to grant an instruction on lesser-included offenses.

Section E contends the lower court did not instruct the jury on elements of the underlying felony of robbery.

Section F states the court failed to adequately instruct the jury at sentencing.

Section G claims that allowing the jury to consider as an aggravating circumstance, robbery for pecuniary gain, failed to narrow the class of death eligibility.

Section H states that allowing the jury to be qualified under the criteria set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), prior to the guilt phase, resulted in a prosecution-prone jury.

Section H(2d) claims petitioner was denied the assistance of an independent psychological and/or psychiatric expert to assist him in his defense.

Requests were not made for the instructions referred to under Sections D and E; no assignments of error were asserted on the instructions during the sentencing phase or presented to the Court on direct appeal under Section F, and the claims are waived and procedurally barred. The Section G question was not raised at trial or on direct appeal and is waived. The Section H issue has been decided by this Court

adversely to petitioner's contention, and the Fifth Circuit Court of Appeals has done likewise.[1]

In Section H(2d), petitioner claims that he was denied the assistance of an independent psychological and/or psychiatric expert to assist him in his defense. Petitioner was examined on court order by motion of the State. No further motion was made for additional examination at trial, no error was assigned in the denial of such assistance on direct appeal The claim was waived and is procedurally barred.

We have considered the claims asserted by the petitioner, singly and collectively, and are of the opinion that they do not justify vacating the judgment and sentence in this case. Therefore, the Motion to Vacate or Set Aside Judgment and Sentence is denied.

MOTION TO VACATE JUDGMENT AND SENTENCE DENIED.

PATTERSON, C.J., WALKER, P.J., HAWKINS, DAN LEE, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., CONCUR.

---

[1]Petitioner relies on Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). In Rault v. Louisiana, ____ F.2d ____ (No. 85-3281, 5th Cir. 1985), the Fifth Circuit Court of Appeals rejected the Grigsby rationale. Note that the United States Supreme Court has granted the State of Arkansas petition for writ of certiorari to review the decision of the Eighth Circuit affirming the district court's decision in Grigsby, supra. See: Lockhart v. McCree, ___ U.S. ____, 54 U.S.L.W. 3223, No. 84-1865 (October 8, 1985).

Appendix B

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 26, 1986

ANDERSON, J.

56,159 James E. Brown v. Bulah D. Brown; Chancery, Oktibbeha; Affirmed. Prather, J., Not Participating.

SULLIVAN, J.

X 55,362 Nazareth Gates v. State; Circuit, Oktibbeha; Conviction of Murder and Sentence of Life Imprisonment Affirmed.

56,034 Gary Moawad v. State; Circuit, Panola; Apellant's Papers Treated as Motion for Out-of-Time Appeals of Three (3) Convictions and Sentences in the Circuit Court of Panola County, MS; Motion for Out-of-Time Appeals Sustained and Indigency Hearing Ordered. Anderson, J., Not Participating.

56,170 James Ray Burleson v. Gerald Dean Burleson; Chancery, Attala; Affirmed. Appellee's Motion for Attorney's Fees Sustained in the Amount of $400.00.

56,550 Lottie Creel and Amy Ladner v. Lloyd Watson and Lula Faye Watson; Chancery, Harrison; Affirmed.

Misc. #2044 Richard Montalbano v. Miss. State Board of Chiropractic Examiners; Motion for Stay of Execution/Supersedeas Overruled. See Miss. Code Ann. § 73-6-19(5).

ROBERTSON, J.

X 55,383 Ruben Doyle Foster, SR. v. State; Circuit, Lee; Reversed and Remanded for a New Trial.

X 56,053 Frank Talbert Malone v. State; Circuit, Hancock; Conviction of Armed Robbery and Sentence of Eleven (11) Years Affirmed.

X 56,465 Estate of Roxie Bunch, Dec'd, Dr. S. L. Bailey and James Bailey, Executors v. Heirs of Roxie Bunch; Chancery, Attala; Reversed and Remanded.

PRATHER, J.

X 56,526 Dorothy B. Olson v. Jeri Olson Flinn; Chancery, Adams; Affirmed.

56,417 Louis Watson v. State; Circuit, Washington; Conviction of Felony Shoplifting as an Habitual Offender and Sentence of Five (5) Years Affirmed.

DAN LEE, J.

X 55,336 Elf Acquitaine, Inc. (Formerly Acquitaine Oil Corp.), et al. & Florida Exploration Co., et al. v. Amoco Production Co. & Sabine Corp.; Chancery, Jefferson Davis; Reversed and Rendered.

X 56,086 James Alfred Coyne, Jr. v. State; Circuit, Pearl River; Conviction for Possession of Marijuana with Intent to Deliver and Sentence of Ten (10) Years Affirmed.

55,349 George F. Foster v. Donna M. Foster Barefoot; Chancery, Leflore; Affirmed.

56,144 Terry Hanner v. State; Circuit, Hinds; Conviction of Grand Larceny as an Habitual Offender and Sentence of Five (5) Years Affirmed.

DAN LEE, J. (Cont'd):

56,475 Louis Watson v. State; Circuit, Washington; Conviction of Felony Shoplifting as an Habitual Offender and Sentence of Five (5) Years Affirmed.

55,030 Town of Lucedale, MS v. George County Nursing Home, Inc.; Motion for Statutory Penalty Overruled.

HAWKINS, J.

XX 55,035 John E. Hughes, Jr. v. Maurice F. Tyler; Circuit, Leflore; Affirmed. Robertson and Sullivan, JJ., Specially Concur.

X 55,309 Frank A. Nichols, et ux. v. Raymond C. Stacks d/b/a Raymond C. Stacks Construction Co.; Chancery, Lee; Affirmed in Part, Reversed and Remanded in Part.

X 55,339 Charles Lee Stokes v. State; Circuit, Alcorn; Reversed and Remanded.

X 56,060 Georgia-Pacific Corporation v. Mary Veal; Circuit, Amite; Reversed, and Order of Mississippi Workmen's Compensation Commission Reinstated.

55,372 First Southern Savings Ass'n of Jackson County v. Singing River Mall Co., a Mississippi General Partnership, et al.; Chancery, Jackson; Affirmed.

ROY NOBLE LEE, P.J.

X 55,909 Gwendolyn Smith and James Ray Smith v. Albert Ray Lee, M.D.; Circuit, Walthall; Reversed and Remanded.

55,389 Mid-South Packers, Inc. and American Motorists Ins. Co. v. Richard H. Vance; Circuit, Lee; Affirmed.

55,406 Walter L. Porter v. Dorothy L. Porter; Chancery, Oktibbeha; Affirmed. Appellee's Motion to Strike Overruled.

WALKER, P.J.

55,356 Phillip Scott Livingston v. State; Circuit, DeSoto; Reversed and Remanded.

56,393 Johnny Anderson and Ricky Earl Robinson v. State; County, Coahoma; Conviction of Robbery and Sentence of Twelve (12) Years Affirmed.

56,557 Debra Butler v. State; Circuit, Hinds; Conviction of Felony Shoplifting and Sentence of Five (5) Years, to Run Consecutive to Cases #3920 and #3921, Affirmed.

56,595 Mary Payne v. Mississippi Employment Security Comm'n; Circuit, Neshoba; Affirmed.

PATTERSON, C.J.

X 55,208 Denson A. Ward, III v. Ford Motor Co.; Circuit, Coahoma; Reversed and Remanded.

X 55,263 Patricia Scafidel v. Dr. Benjamin L. Crawford, III, Dr. LaDon Langston & Dr. E. J. Price d/b/a Southwest Clinic for Women; Circuit, Pike; Affirmed.

PATTERSON, C.J. (Cont'd):

X 55,338 Annie McCallister Gray v. Nelson W. Gray; Chancery, Alcorn; Reversed and Remanded.

56,164 Charles E. Smith & Terry Smith v. Massey Ferguson Credit Corporation; Circuit, Bolivar; Affirmed.

THE COURT SITTING EN BANC:

54,123 Bankers Life & Casualty Co. v. Lloyd M. Crenshaw; Circuit, Jackson; Petition for Rehearing Denied. Walker, P.J., Hawkins, Prather and Robertson, JJ., Dissent.

54,123 Bankers Life & Casualty Co. v. Lloyd M. Crenshaw; Circuit, Jackson; Motion to Correct Judgment Overruled.

54,966 John Keith Henry v. State; Circuit, Newton; Petition for Rehearing Denied. Original Opinion Modified. Roy Noble Lee, P.J., Not Participating.

55,016 Audrey Smith v. Cleveland Truck & Tractor Repair, Inc.; Circuit, Bolivar; Motion for Stay of Mandate Overruled. Petition for Rehearing Denied.

55,053 Donald William Dufour v. State; Circuit, Hinds; Petition for Rehearing on Motion to Vacate Judgment and Sentence Denied. Anderson, J., Not Participating.

55,328 Edmond L. Ratliff v. City of Jackson, MS; Circuit, Hinds; Petition for Rehearing Denied.

55,944 John V. Pool, III v. State; Circuit, Jones; Petition for Rehearing Denied.

56,000 Sid Shaw and H. A. Dickson v. The Ten Point Co.; Chancery, Hinds; Petition for Rehearing Denied.

56,246 Noxubee County School Board v. Carolyn Overton; Chancery, Noxubee; Petition for Rehearing Denied.

Misc. #1735-E Henderson Sharp, Jr. v. State; Circuit, Lowndes; Motion to Reconsider Motion for Post-Conviction Relief Overruled. Prather, J., Not Participating.

PER CURIAM:

55,433 Mississippi Farm Bureau Mutual Insurance Company v. John Garrett; Motion to Reset Oral Argument Sustained, and Case Set for Hearing on March 11, 1986.

55,435 Employers Mutual Casualty Company v. Teresa Tompkins and William E. Tompkins; Motion to Reschedule Oral Argument Overruled.

56,226 Bruce Telephone Company, Inc. v. Miss. Public Service Commission; Joint Motion for Substitution of Counsel Sustained.

56,558 Jose Artea gpiloto, Et Al. v. State; Motion for Additional Pages to Appellants' Brief Sustained.

PER CURIAM (Cont'd):

56,684 Mary Pearl Blackmon, Et Al. v. Julius Payne and Highland Trucking Company, Inc. and Thomas Jefferson O'Quinn, IV v. Julius Payne and Highland Trucking Company, Inc.; Motion for Additional Pages Sustained.

56,796 Billie V. Bush v. City of Gulfport; Motion to Docket and Dismiss Appeal Sustained.

56,911 Southern Natural Gas Company v. Joseph F. Fritz, Et Al.; Motion of Appellees to Place Case on the Preference Docket and Advance Overruled.

56,924 Mississippi Employment Security Commission v. Ernest N. Sellers; Suggestion of Diminution of Record Denied.

56,986 Contoy, Inc., Et Al. v. Curtis Clay Coble; Motion of Appellee to Dismiss Appeal Sustained.

57,021 William M. Johnston v. George L. Pope; Motion to Dismiss Appeal Sustained.

57,034 Kenneth McLendon v. Caterpillar Tractor Company; Motion to Docket and Dismiss Appeal Sustained.

Misc. #1738B Ricky Don Sellers v. Circuit Court of Jones County; Petition for Writ of Mandamus Denied.

Misc. #1974A Edwin Earl Hood v. State; Petition for Writ of Certiorari to the Official Court Reporter of Copiah County, Mrs. Gwen Davis, and the Circuit Clerk of Copiah County Granted.

Misc. #2011 Audrey Nichols v. Circuit Court of Alcorn County, Petition for Writ of Mandamus Denied.

Misc. #2043 Terry R. Cooper and Earl Roy Cooper v. Roy Blane Cooper; Motion for Alimony Pending Appeal and Attorney's Fees Overruled.

Misc. #2052 Timothious St. Cloud Bird v. Harrison County Circuit Court; Petition for Writ of Mandamus Denied.

Misc. #2054 Calvin Birks v. State; Motion to Amend, Etc. Overruled.

Misc. #2055 Nathaniel Spann v. State; Motion for Leave to File an Out-of-Time Appeal Overruled without Prejudice to Its Being Filed in the Trial Court.

Misc. #2058 Laura A. Travis v. John M. Travis; Motion to Withdraw as Counsel for Appellant Sustained.

ONLY CASES MARKED "X" HAVE WRITTEN OPINIONS.

Respectfully submitted,

Sue Gordon, Clerk
Yvonne Burnham, D. C.

NO. 86-6889

IN THE SUPREME COURT OF THE UNITED STATES

MARCH 1986 TERM

DONALD DUFOUR,

Petitioner

VERSUS

STATE OF MISSISSIPPI,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3813

QUESTIONS PRESENTED

I.

WHERE THE COURT BELOW FOUND PETITIONER TO HAVE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL UNDER A PROPER APPLICATION OF STRICKLAND V. WASHINGTON, CERTIORARI SHOULD BE DENIED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

NO. 85-6889

IN THE SUPREME COURT OF THE UNITED STATES

MARCH 1986 TERM

DONALD DUFOUR,

Petitioner

VERSUS

STATE OF MISSISSIPPI,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

II. OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Dufour v. State, 483 So.2d 307 (Miss. 1985). A copy of the opinion is before the Court as Exhibit A to petitioner's Petition for Writ of Certiorari to the Supreme Court of Mississippi.

III. JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257 (3). He fails to do so.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments V, VI, VIII, and XIV. Respondent relies on Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1984).

V. STATEMENT OF THE CASE

Petitioner appears before this Court as a result of his conviction and resulting death sentence in the Circuit Court of Hinds County, Mississippi, First Judicial District. This conviction and sentence grew out of the October 13, 1982 robbery and murder of Earl Wayne Peeples and Danny Earl King. Petitioner was indicted for this crime on November 5, 1985. Petitioner's trial began on March 28, 1983, Honorable Reuben V. Anderson, Circuit Judge presiding. At the conclusion of the sentencing phase the jury returned a sentencing verdict of death, finding that the following aggravating circumstances existed:

We the jury, unanimously find that the aggravating circumstances of :

> 1. The capital offense was committed while the defendant was engaged in the commission of or an attempt to commit the crime of robbery for pecuniary gain.
>
> 2. The capital offense was especially heinous, atrocious and cruel.

On April 11, 1983, defendant filed a motion for new trial raising twenty-one (21) grounds for relief. A summary order denying such was entered on April 12, 1983. On this automatic appeal to the Mississippi Supreme Court petitioner raised the following claims:

On direct appeal:

> 1. The trial court erred in refusing the appellant's request to hire an investigator.
>
> 2. The trail court erred in excusing for cause Jamie Honeycutt because of her beliefs regarding the death penalty.

3. The trial court erred in excusing for cause Pamela Summers in violation of the Witherspoon Rule.

4. The trial court erred in refusing to exclude Gerald H. Bagwell for cause.

5. The trial court erred in admitting certain pictures depicting the deceased in gruesome aspect, which pictures were cumulative, had no other purpose than to inflame the jury against the defendant, and connected the defendant with another crime for which he was not being tried.

6. The trial court erred in admitting pictures of screwdrivers not used in commission of the crime.

7. The state failed to prove the essential elements of the crime of robbery.

Appellant's Assignments of Error.

On June 6, 1984 the court below unanimously affirmed the conviction and sentence entered by the Hinds County jury. A petition for rehearing was filed and subsequently denied on July 25, 1984. Dufour v. State, 453 So.2d 337 (Miss. 1984).

Petitioner then filed with this Court a Petition for Writ of Certiorari to the Mississippi Supreme Court. This petition stated in the Questions Presented section the following:

1. Whether petitioner's right guaranteed under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the exclusion of prospective jurors who did to express unequivocally that they would automatically vote against the death penalty in petitioner's case?

a. Whether the trial court properly excluded jurors on the basis of ambivalent and contradictory statements concerning their ability to vote for the death penalty?

b. Whether the trial court properly excluded a prospective juror solely because she expressed reluctance to vote for the death penalty in a case in which the state's evidence consisted primarily of a co-defendant's testimony?

2. Whether petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel, due process of law and equal protection of the laws were violated by the trial court's refusal to provide petitioner with investigative assistance

for the purpose of obtaining evidence in support of his defense and in mitigation of punishment where petitioner was indigent and charged with a capital offense?

Petition for Writ of Certiorari, No. 84-5626.

In due course that petition was denied on February 19, 1985. Dufour v. Mississippi, ___ U.S. ___, 84 L.Ed.2d 368, ___ S.Ct. ___ (1985). Petitioner then petitioned for a rehearing of his case before this Court. The Court denied his petition for rehearing on April 1, 1985.

Upon denial of the writ of certiorari and rehearing the petitioner filed a Motion To Vacate Judgment And Sentence. In this motion petitioner made the following claims:

A. Petitioner Was Deprived of His Right To Effective Assistance of Counsel.

1. Failure to Investigate and Present Mitigating Witnesses.

2. Failure to Investigate, Obtain and Present Psychiatric or Psychological Evidence

3. Trial Counsels Failure To Request Instructions On Lesser Included Offenses and Elements of the Primary Offense Charged

4. Failure To Object To Prosecutorial Misconduct

5. Failure to Adequately Cross-Examine State's Witness

6. Failure To Object To Improper Evidence of Other Crimes

7. Failure To Make An Adequate Request For Investigative Services

8. Failure to Present Errors on Appeal

B. Presistent Prosecutorial Misconduct Rendered The Trial and Sentencing Fundamentally Unfair

C. [no claim so designated]

D. Failure To Give Instructions On Lesser Included Offenses

E. Failure To Give Instructions On Essential Element of the Crime

F. Inadequate Sentencing Instructions

G. Failure to Narrow Class of Death Eligibility

H. [1] Prosecution-Prone Jury

H. [2] Failure to allow Access to Expert Assistance

Application For Leave To File Motion To Vacate Or Set Aside Judgment And Sentence

On December 18, 1985, the Supreme Court of Mississippi denied his post-conviction relief motion in a written opinion, a petition for rehearing was subsequently denied on February 26, 1986. Dufour v. State, 483 So.2d 307 (Miss. 1985). The present petition is taken from this denial.

VI. STATEMENT OF FACTS

The facts of this case are graphically and sufficiently set forth in the opinion of this Court. Dufour v. State, 453 So.2d at 338-40. They need not be restated here.

VII. REASONS FOR DENYING THE WRIT

PETITIONER HAS PRESENTED NO SUBSTANTIAL FEDERAL QUESTION THAT IS COGNIZABLE BY THIS COURT THEREFORE THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

ARGUMENT

I.

WHERE THE COURT BELOW FOUND PETITIONER TO HAVE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL UNDER A PROPER APPLICATION OF STRICKLAND V. WASHINGTON, CERTIORARI SHOULD BE DENIED.

Petitioner presents three question, all of which revolve around the question of whether or not he received effective assistance of counsel. The first two questions dealing with the furnishing and use of mental health professionals has been factually decided against petitioner. The third deals with the presentation of mitigating evidence during the sentencing phase of the trial and was factually resolved against petitioner. These factual findings are entitled to due deference on this petition.Looking to the opinion of the court below we find that petitioner's claims here were the first addressed by the court below. The court below held:

> CLAIMS
> A.
>
> Petitioner was Deprived of His right to Effective Assistance of Counsel.
>
> (1) Failure to Investigate and Present Mitigation Witnesses.

> Petitioner claims that defense counsel failed to investigate whether there were any potential witnesses who could have presented favorable testimony as to why he deserved to have his life spared. Petitioner's counsel, R.L. Houston, talked with petitioner's brothers in Florida on several occasions, although they state in their affidavits that they cannot recall speaking to the Jackson attorneys. They told Houston that they would not come to Jackson nor did they want to get involved in the trial of their brother's case. They refused to help petitioner at that time.
>
> (2) Failure to Investigate, Obtain and Present Psychiatric or Psychological Evidence.
>
> Petitioner claims that defense counsel failed to make application to the trial court for funds to conduct a psychological evaluation of petitioner for the purpose of determining whether mitigating circumstances existed. Further, that he had no expert assistance because counsel did not request it. However, petitioner was examined pursuant to a court order. The professionals were not people selected by the State, but by the trial court. Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an examination would have produced the claimed results, nor has prejudice been shown.
>
> 483 So.2d at 308.

The state court after considering and disposing of petitioner's other claims on ineffectiveness concluded:

> The nine (9) claims hereinabove, which relate to the total claim of ineffective assistance of counsel must be considered, singly and collectively, after applying the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).
>
> . . .
>
> We are of the opinion that the petitioner has not demonstrated that his claims of ineffective assistance of counsel have met the two-pronged test of Strickland v. Washington, supra, viz, (1) counsel's performance was deficient to the extent that he made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment, and (2) the deficient performance prejudiced the defense to the extent that counsel's errors were so serious as to deprive petitioner of a fair trial, a trial whose result is reliable.
>
> 483 So.2d at 309-11.

It is clear that the court below applied the proper standard in determining whether or not petitioner received effective assistance of counsel. Strickland, does not require but one standard of prejudice when considering claims of ineffectiveness.The standard of prejudice employed for &nswering questions arising from counsel's failure to secure psychiatric or psychological experts to seek for mitigating evidence is the same as for any other real or imagined deficiency of counsel.

On the issue of ineffectiveness of counsel we not that this case is not factually unlike Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the claim was that counsel failed to present character and psychological evidence at the sentencing phase of his trial. The standard set forth there has been adopted by the court below in Stringer v. State, 454 So.2d 468 (Miss. 1984), and applied its rational in Wilcher v. State, 479 So.2d 710 (Miss. 1985); Leatherwood, 473 So.2d 964 (Miss. 1985), Thames v. State, 454 So.2d 486 (Miss. 1984); In Re Hill, 460 So.2d 792 (Miss. 1984); Ward v. State, 461 So.2d 724 (Miss. 1984) and Lambert v. State, 462 So.2d 792 (1984). Appellant has failed to meet the two pronged test set forth therein.

In its consideration of the prejudice prong in Strickland, the Court stated:

> With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.
>
> 80 L.Ed.2d at 701.

The case at bar is no different. Petitioner was not from Mississippi, when contacted his relatives in Florida, one of them a lawyer, refused to come to his aid. They refused to come and testify as to his character or offer others who could do so. The simply did not want to get involved in the trial. Regarding the psychiatric or psychological evidence petitioner has done less than in Strickland, he has present the court below and this Court with nothing but conjecture. Dr. Stanley's affidavit states he was not requested to make any evaluation for "psychologically mitigating" circumstances. Therefore he "could not provide any psychological mitigating explanation for why Mr. Dufour would have committed the alleged crimes, if such explanation does exist." It is interesting to note that petitioner is presently under the sentence of death and a sentence of life imprisonment for three murders in the state of Florida. The facts and circumstances surrounding those three murders are similar to the ones of the case at bar. Prior to the trial in which petitioner received the death sentence in Florida, he was fully examined by defense selected psychiatric and psychological experts. They issued a report to defense counsel. I am sure that that report is available to present counsel and could have been presented to the court below as evidence in support of their theory. No such report was presented to the court below. One must presume that it was not favorable to petitioner's position here. Strickland at least presented the Court with something on which to base such a claim. There has to be some indication that there is something to be gained in this area before it even becomes significant in the determination of attorney competence.

Petitioner relies on Ake v. Oklahoma, 470 U.S. ____, 84 L.Ed.2d 53, 106 S.Ct. ____ (1985), in support of his claim of ineffectiveness. However Ake does not offer petitioner solace. The holding in Ake, is two fold. First the Court held:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.
>
> [Emphasis added] 84 L.Ed.2d at 66.

The secondly and more importantly as it relates to this case, the Court held:

> Ake was also denied the means of presenting evidence to rebut the State's evidence of his future dangerousness. The forgoing discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness.
>
> . . .
>
> In addition, Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, Okla. State. Tit 21, $ 701.12(7) (1981), and on which the prosecutor relied at sentencing. We therefore conclude that Ake also was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.
>
> [Empahsis added] 84 L.Ed.2d at 67-68.

It is clear that Ake, has no application here as petitioner's sanity was never in question nor was any evidence introduced concerning petitioner's future dangerousness. The fact of the matter is that evidence of future dangerousness can no longer be

introduced at the sentencing phase of a capital murder trial in Mississippi. Williams v. State, 445 So.2d 798, 813 (Miss. 1984); Wiley v. State, 449 So.2d 756, 761-62 (Miss. 1984). There being no psychiatric or psychological testimony by the state to rebut there is no Ake violation and therefore no ineffective assistance of counsel in this case.

One further matter needing to be addressed is that petitioner clearly misleads the Court when he cites Davis v. State, 374 So.2d 1293 (Miss. 1979); Phillips v. State, 197 So.2d 241 (Miss. 1979) and Laughter v. State, 235 So.2d 468 (1970), for the proposition that prior to petitioner's trial Mississippi precedent indicated that indigent defendants did not have a right to the assistance of mental health professionals at trial. This is simply not true. We only have to look to the opinion on direct appeal of this case to find that petitioner grossly mistates the law. Davis stands for the proposition that "the determination of furnishing the indigent accused any expert, other than psychiatric, would be made on a case by case basis." Dufour v. State, 453 So.2d 337(Miss. 1984). Mississippi has long recognized the right to assistance of mental health professionals at trial at state expense.

Respondents recognize that the Sixth Amendment guarantees criminal defendants the right to assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Concomitantly, the Sixth Amendment requires effective assistance of counsel. In Strickland v. Washington, the Court articulated the above cited two prong test to be used in determining whether or not counsel's performance meets constitutional muster in the following words:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so

> serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> 80 L.Ed.2d at 693.

A petitioner who seeks to overturn his conviction or sentence on grounds of ineffective assistance of counsel has the burden to demonstrate by sufficient factual proof by a preponderance of the evidence, an identifiable lapse on the part of counsel, as well as some actual adverse impact upon the fairness of the trial which results from the lapse. Daniels v. Maggio, 669 F.2d 1075 (5th Cir 1983); Boyd v. Estelle, 661 F.2d 388 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). The determination of whether counsel renders reasonably effective assistance turns in each case on the totality of the facts in the entire record. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981). In doing so the reviewing Court must take into consideration the strength of the State's case. In Strickland, supra, the Court summarized this inquiry thusly:

> More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91 100-1001 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.
>
> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. Form counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68-69.

> These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness clai , the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.
>
> 80 L.Ed.2d at 693-94.

Likewise, judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of an attorney's performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Washington v. Watkins, supra. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 80 L.Ed.2d at 694-695, citing Michael v. Louisiana, 350 U.S. 91, 100 L.Ed.2d 83, 76 S.Ct. 158 (1955).

The claims presented here fall within what the Supreme Court referred to a "sound trial strategy". In this context the Court stated in Strickland v. Washington, supra:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionallly competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
>
> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defenses are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or

> even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, 624 F.2d, at 209-10.

[Emphasis added] 80 L.Ed.2d at 695-96.

See also: Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972); Gaines v. Hopper, 575 F.2d 1147(5th Cir. 1978). Cf: Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Washington v. Watkins, supra; Jones v. Estelle, 632 F.2d 490 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981). Counsel is not required to pursue every path until it bears fruit or until all conceivable hope withers. Lovett v. State of Florida, supra.

Complaints concerning counsel's alleged failure to file certain motions, call certain witnesses, ask certain questions, make certain objections, and similar activites fall within the ambit of trial strategy. Murray v. Maggio, 736 F.2d 279 (5th Cir.1984); Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984).

The Supreme Court set out the test for the second prong of the inquiry into the effectiveness of counsel, that to determine actual prejudice as follows:

> Accordingly, the appropritate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-bernal, 458 U.S., at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice,

"nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency. Although these facts may actually have entered into counsel's selection of strategies and, to that limited extent, may then affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceedings under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable doubt respect in guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and the factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

[Empahsis added] 80 L.Ed.2d at 698-99.

See also: Gomez v. McKaskle, 748 F.2d 1107 (5th Cir. 1984).

Petitioner's claim that his trial counsel did not investigate and present mitigation evidence during the sentencing phase of his trial and thereby rendered him ineffective assistance of counsel is likewise with out merit. Even though petitioner states that there is a constitutional duty to present mitigating evidence the courts have not so held. In fact the Eleventh Circuit held that there is no absolute duty to present mitigating character evidence. Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985). Petitioner's counsel, R. L. Houston, did talk with his brothers in Florida on several occasions, although they state in their affidavits that they cannot recall ever speaking with the Jackson attorneys. They told Houston that they would not come to Jackson nor did they want to get involved with the trial of their brother's case. They refused to come to petitioner's assistance at that time. Only now after the fact do they become concerned with their brother's welfare. Counsel often has to depend upon the information communicated to him by the defendant and his family. This can limit the scope of the independent investigation necessary for the attorney to make. Mitchell v. Kemp, supra at 889. Here petitioner gave counsel no one other than the brothers to contact and the brothers were unhelpful. It is not a mitigating circumstance that petitioner's brothers and family members would be affected by his death. That is irrelevant to the consideration of whether he should be sentenced to death or not as it is not eviedence of the particular background or character of petitioner nor is it evidence of the particularized factual circumstances surrounding the crime for which he was convicted. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. ____, 90 L.Ed.2d 1, 106 S.Ct. ____ (1986). Because his brothers' refused to help petitioner in his time of need, he cannot now lay this at the feet of trial counsel. The

family had the opportunity to help and they refused. This does not make out a case of ineffective assistance of counsel. Nor does the failure to put on character evidence in mitigation. See Stanley v. Zant, 697 F.2d 955, 962-65 (11th Cir. 1983); Willimas v. Maggio, 679 F.2d 381 (5th Cir. 1982); Gray v. Lucas, 677 F.2d 1086 (5th cir. 1982). Stanley clearly holds that evidence tending to "humanize" a capital defendant is not constitutionally required. The effect of producing no mitigating evidence at all is explored in Adams v. Wainwright, 709 F.2d 1443, 1445-46 (11th Cir. 1983), and held not to be error.

The holdings in Griffin v. Wainwright, 760 F.2d 1512 (11th Cir. 1985); Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984); Celestine v. Blackburn, 750 F.2d 353, 356-58 (5th Cir. 1984); Burger v. Kemp, 753 F.2d 930, 936-39 (11th Cir. 1985) and Stephens v. Kemp, 721 F.2d 1300, 1304 (11th Cir. 1983) all support the holding of the Mississippi Supreme Court that petitioner was not denied effective assistance of counsel at the sentencing phase of his trial. In Moore v. Maggio, 740 F.2d 308 (5th Cir. 1984), the Fifth Circuit applying Strickland, held:

> An error by counsel, eve if professionally unreasonable, does not require setting aside a defendant's conviction or sentence if the error had no effect on the judgment. Thus, it is insufficient for the defendant to show that counsel's errors had some possible effect on the verdict. "The defendant must show that there is a reasonable probability that, that but for the counsel's unprofessional errors, the result would have been different." 104 S.Ct. at 2068. The Court held that when a defendant challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court to the extent that it independently re-weighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069.
>
> [Emphasis added] 704 F.2d at 315.

Petitioner has not shown even the mere possibility that the failure to present the evidence he now says should have been presented would have some effect on the verdict. He certainly has not shown that there is a reasonable probability that the inclusion of this evidence would have caused the balance of aggravating and mitigating circumstances not to warrant death. Petitioner fails to show here as he did below that he was rendered ineffective assistance of counsel.

CONCLUSION

For the above and foregoing reasons respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General State of Mississippi, do hereby certify that I have this day causemailed, via United States Postal Service, first-class postage preptrue and correct copy of the foregoing Response to Petition for Writ of Certiorari to the following:

Bernard S. Grimm
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001

and

Robert E. Morin
Fisher & MOrin
Suite 201
419 Seventh Street, N.W.
Washington, D.C. 20004

This the 23rd day of July, 1986.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

SUPREME COURT OF THE UNITED STATES

DONALD WILLIAM DUFOUR *v.* MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 85–6889. Decided October 14, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from denial of certiorari.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Mississippi insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because this petition presents an important issue concerning the application of this Court's decision in *Strickland* v. *Washington*, 466 U. S. 668 (1984).

I

Petitioner Donald Dufour was convicted of capital murder occurring in the course of a robbery. His appointed counsel presented no evidence in mitigation of sentence at the penalty phase of his trial. The jury found that the State had established two aggravating circumstances and recommended a sentence of death. The State Supreme Court affirmed peti-

tioner's conviction and death sentence. *Dufour* v. *State*, 453 So. 2d 337 (Miss. 1984). This Court denied certiorari. *Dufour* v. *Mississippi*, —— U. S. —— (1985). Petitioner then instituted a post-conviction proceeding to vacate judgment and sentence in the State trial court, contending that he had received ineffective assistance of counsel in that his appointed trial counsel had failed to request appointment of a psychiatrist to assist the defense in developing psychological evidence to be submitted to the jury in mitigation of sentence. The trial court summarily denied this and petitioner's other claims, and the State Supreme Court affirmed. *Dufour* v. *State*, 483 So. 2d 307 (Miss. 1985).

It appears that in his post-conviction application, petitioner again requested appointment of a psychiatrist to assist counsel in showing that petitioner's defense at the penalty phase of his trial was prejudiced by the absence of psychological evidence. He submitted the affidavit of Dr. Stanley, the court-appointed psychiatrist who had previously examined him for the purpose of determining his compentency to stand trial. Dr. Stanley stated that the limited examination he had conducted for purposes of determining competency bore no relation to the more extensive and qualitatively different investigation required to present useful assistance to trial counsel on the subject of mitigation. Pet. for Cert. 7. Both the trial court and State Supreme Court denied relief without ruling on petitioner's renewed request for the appointment of a psychiatrist; no evidentiary hearing was held on petitioner's claim of ineffective assistance. The State Supreme Court affirmed the denial of relief, stating that:

> "Petitioner claims that defense counsel failed to make application to the trial court for funds to conduct a psychological evaluation of petitioner for the purpose of determining whether mitigating circumstances existed. Further, that he had no expert assistance because counsel did not request it. However, petitioner was examined pursuant to a court order. The professionals were not people selected by the State, but by the trial court. Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an examination would have produced the claimed results, nor has prejudice been shown." *Dufour* v. *State*, *supra*, at 308.

II

In *Strickland*, *supra*, this Court established a two-part standard for evaluating claims of ineffective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U. S., at 687. For the reasons I then stated in dissent, I continue to believe that "a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby." *Id.*, at 712 (MARSHALL, J., dissenting). The present case provides a graphic demonstration of the untenable nature of the prejudice standard announced in *Strickland*.

The State Supreme Court, in affirming the denial of post-conviction relief on this claim, relied entirely upon the prejudice portion of the *Strickland* standard. *Dufour* v. *State*, *supra*, at 308. Petitioner's claim was denied because he did not proffer the psychiatric evidence which he contended should have been introduced at trial. He did not do so precisely because, as an indigent, he could not afford to retain a psychiatrist to make an examination either in preparation for trial or upon his application for post-conviction relief. In

short, the prejudice standard in such a circumstance is insurmountable; prejudice cannot be shown because the alleged error of counsel was in failing to seek the appointment of an expert without whose assistance the evidence which would show prejudice cannot be brought to light. On a claim of this kind petitioner cannot submit affidavits of witnesses who were not investigated or who were not called, or in some other manner raise an inference as to prejudice. The essence of psychiatric evidence rests in the expert qualifications of the objective examiner; if the examiner will not volunteer his services, petitioner must content himself with only so much justice as he can pay for.

In *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), this Court recognized that under some circumstances "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense," and that in these conditions the accused is entitled to the appointment of psychiatric assistance at public expense. That the failure to seek such appointment to assist counsel in the development of evidence in mitigation of sentence may in some cases rise to the level of constitutionally ineffective assistance I do not doubt.[1] "[C]ounsel's general duty to investigate . . . takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care." *Strickland*, *supra*, at 706 (BRENNAN, J., concurring in part and dissenting in part).[2] The prejudice prong of

[1] I would not reach the question of whether counsel's failure in this case to move for the appointment of a psychiatrist was constitutionally deficient representation under the first part of the test established by *Strickland* v. *Washington*, 466 U. S. 668 (1984). The correctness of the State Supreme Court's determination on the question of prejudice is the sole issue posed by the petition.

[2] I note that petitioner's trial counsel failed to present any evidence at all in mitigation of sentence. As I have previously stated, I believe that in all but the most extraordinary cases, such failure is, without more, a denial of effective assistance of counsel. See *Berry* v. *King*, —— U. S. —— (1986) (MARSHALL, J., dissenting from denial of certiorari).

Strickland, *supra*, as it was applied below, will have the effect of depriving all such defendants of their constitutional rights solely as a result of their indigence. Because I believe that such application of the *Strickland* standard is incompatible with the requirements of the Constitution, I would grant the petition for certiorari.